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MOGE v. *MOGE*
A NEW VISION OF SPOUSAL SUPPORT

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MOGE v. *MOGE*
A NEW VISION OF SPOUSAL SUPPORT

INTRODUCTION

Although the 1985 *Divorce Act* provided a series of objectives intended to guide the courts in awarding spousal support, the negotiation and litigation of such claims have been carried out in considerable confusion in the years since the passage of the Act. The desire of policy-makers and parliamentarians to advance women's equality has conflicted with the contradictory objective of limiting financial relief for separated and divorced women to the period during which they are becoming economically self-sufficient.

In the *Moge* v. *Moge* decision ([1992] 3 S.C.R. 813), handed down 17 December 1992, the Supreme Court of Canada rejected the "self-sufficiency" model for spousal support, and developed a new series of policy considerations to aid the courts in the application of the statutory criteria for spousal support awards. These guidelines seek to accomplish an equitable sharing of the economic consequences of marriage. Rather than creating a set of concrete rules to guide the lower courts, the Court discussed the economic and social realities for divorcing couples in Canada today, and recognized the harsh prospects faced by spouses, particularly women, in the decade since the Court's last major pronouncements on spousal support in the 1987 "trilogy" of cases: *Pelech*, *Caron* and *Richardson*.[1]

The *Moge* decision will have a profound impact on family law in Canada. The decision reinterprets the *Divorce Act* tests for support, and moves from the traditional needs and means analysis to a compensatory support model. Although the factual basis for the decision

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(1) *Pelech* v. *Pelech*, [1987] 1 S.C.R. 801; *Richardson* v. *Richardson*, [1987] 1 S.C.R. 857; and *Caron* v. *Caron*, [1987] 1 S.C.R. 892.

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was relatively narrow, the Court clearly went beyond it to articulate a sweeping set of principles designed to guide the courts across Canada in the area of spousal support.

THE FACTS

The case came to the Supreme Court of Canada on appeal from the Manitoba Court of Appeal. The parties had been married in Poland before they arrived in Manitoba in 1960. Throughout their 16-year marriage, the husband had worked full-time outside the home, making no contribution to the work of the household or the care of the children. The wife had been a full-time homemaker, caring for the couple's three children, and had also worked in the evenings, cleaning offices, to supplement her husband's income. After the parties separated in 1973, the wife was awarded child and spousal support. In 1989, Mr. Moge applied to vary or terminate his support obligations to his wife. Mrs. Moge was then 55 years old, working part-time cleaning offices, and none of the children was eligible for child support.

THE RESULT

The Manitoba Court of Queen's Bench terminated the child support obligation, and held that the spousal support obligation would terminate as of 1 December 1989. Mrs. Moge appealed successfully to the Manitoba Court of Appeal, which recognized the economic disadvantage that had resulted to Mrs. Moge from the marriage, and found that she could not be expected to achieve the same level of self-sufficiency as her husband. She was awarded indefinite spousal support in the amount of $150 per month. Mr. Justice Twaddle held that the objectives for a spousal support order set out in the *Divorce Act* could best be met by supplementing the wife's earnings with some support.

On appeal by Mr. Moge, the Manitoba Court of Appeal decision was upheld. Madam Justice L'Heureux-Dubé, for the Supreme Court of Canada, pointed out that, although the case arose under section 17 of the *Divorce Act*, which deals with variation applications, "[i]n a broader sense ... this case turns upon the basic philosophy of support within the Act as a whole" (p. 824). Her reasons outlined a series of general principles that should be considered

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by the courts in applying the provisions of the *Divorce Act* relating to spousal support, but did not set out any clear rules to govern the courts in exercising discretion.

THE REASONS OF THE SUPREME COURT OF CANADA

Mr. Moge's position on the appeal was that spousal support should be terminated, on the basis of the Supreme Court's reasoning in the 1987 trilogy of support cases: *Pelech* v. *Pelech*; *Caron* v. *Caron*; and *Richardson* v. *Richardson*. These cases have been characterized as advancing the "clean break" theory of spousal support: that spouses should be encouraged to sever their relationships as quickly as possible and their agreements should be respected by the courts; such agreements should be overridden only in cases where the dependent spouse's inability to become self-sufficient is causally connected to the marriage. Since all three cases dealt with applications to vary separation agreements, there was widespread uncertainty about the degree to which the "causal connection" test applied to spousal support applications in cases where the parties had never settled their affairs by way of agreement.

The trilogy cases were distinguished on their facts, and held not to apply to the *Moge* case, which dealt with an application to vary a support order that had been made at the time of a divorce. The *Divorce Act* sections dealing with spousal support and variation applications were set out and discussed. Madam Justice L'Heureux-Dubé examined some preliminary issues, including the self-sufficiency model of support and the often-drawn distinction between "traditional" and "modern" marriages. She criticized the parsimonious levels at which self-sufficiency has been deemed to be achieved in many cases in the lower courts, questioned the degree to which the traditional-modern dichotomy is helpful, and directed that the focus of the courts' inquiry must be "the effect of the marriage in either impairing or improving each party's economic prospects" (p. 849).

Madam Justice L'Heureux-Dubé found the words of the *Divorce Act* to imply a requirement for a fair distribution of resources to alleviate the economic consequences of marriage or its breakdown. Although this requirement applies equally to husbands and wives, she noted that "in many if not most marriages, the wife still remains the economically

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disadvantaged partner" (p. 850). All four of the *Divorce Act* objectives for a spousal support order, of which self-sufficiency is only one, must be considered in every support application.

The decision gives considerable attention to the economic disadvantages faced by women in Canada, and the phenomenon referred to as the "feminization of poverty." Madam Justice L'Heureux-Dubé cited some alarming statistics: between 1971 and 1986 the percentage of poor women among all Canadian women more than doubled (p. 853); in 1986, 16% of all women in Canada were considered poor (p. 854); and although there are many causes of women's poverty, "there is no doubt that divorce and its economic effects are playing a role" (p. 854). Citing a number of studies, she held that the "general economic impact of divorce upon women is a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice" (p. 873).

The fact that women are usually primarily responsible for child care, during and after marriage, has post-marriage economic consequences when they retain custody of their children. The diminished earning capacity with which an ex-wife enters the labour force after years of reduced or non-participation in it will be difficult to overcome when career choice is reduced due to the necessity of remaining within proximity to schools, not working late, remaining at home when the child is ill, etc. The former husband who is not awarded custody encounters none of these impediments (p. 863).

There are references in the decision to a voluminous body of research that has contributed to the doctrine of compensatory spousal support. Madam Justice Rosalie Abella, now of the Ontario Court of Appeal, is quoted extensively: "The law ... should ensure, as far as it is able, that the economic disadvantages of caring for children rather than working for wages are removed."[(2)] The compensatory model of spousal support requires that the court recognize a couple's division of responsibility for household management, child care and financial provision: the spouse who assumes the non-lucrative duties is seen as freeing up the other spouse to advance his or her career in the paid labour force. On marriage breakdown, the advantage that has been conferred on the wage-earning spouse is recognized, as is the

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(2) Rosalie S. Abella, "Economic Adjustment on Marriage Breakdown: Support," (1981), 4 *Fam. L. Rev.* 1.

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disadvantage, in terms of reduced ability to become self-sufficient, that has been suffered by the spouse who performed the household and child care duties.

Madam Justice L'Heureux-Dubé found support for the principles of compensatory support in the words of sections 15(7) and 17(7) of the *Divorce Act*, each of which sets out the same objectives. The support or variation order should:

- recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);
- relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- insofar as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

Because it better responds to the objectives for spousal support orders set out in the Act, the compensatory model of spousal support was preferred by the Court over the self-sufficiency model. In applying this new model, a complex set of considerations must go into a court's assessment of the appropriate level of support. The financial consequences of child-care responsibilities that survive the marriage must be accommodated. In setting proper levels of support, the courts should also have regard to the parties' standard of living during the marriage.

CONCURRING REASONS

Madam Justice McLachlin, concurring in the result, added her comments in separate reasons. (Mr. Justice Gonthier concurred in both sets of reasons.) She pointed out that the *Moge* case is one of statutory interpretation, and gave careful consideration to the four objectives set out in section 17(7) (as set out above). She held that the Manitoba trial court had erred in giving no consideration to the first three factors and basing its decision on the goal of

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self-sufficiency exclusively. She made additional comments about the law of causation and evidence relevant to applications under section 17, warning of the increased cost to parties in these matters that would be incurred if a minute and extensive accounting of every daily detail of each marriage were required.

COMMENTARY

Most of the published comments about the *Moge* decision have emphasized its importance, the broad application of its sweeping guidelines, and the uncertainty it has created in the law of spousal support. Although the analysis of Madam Justice L'Heureux-Dubé suggests that wives should receive larger and longer-term support awards, Mrs. Moge was not awarded an increased amount of support.

The type of evidence the parties will in future have to gather in support cases is also unclear. Although the reasons suggest that complex evaluations of the financial advantages and disadvantages resulting from marriage will have to be performed, the Court commented that actuarial evidence should not be necessary, in most cases, to quantify these. Recent cases across the country tend to indicate otherwise, however: without such evidence, how will the courts determine how much money wives have lost by not working for pay throughout the years of the marriage? How would the benefit conferred by the marriage on the employed spouse be quantified? Lawyers acting for the parties in such cases could be found negligent if they did not advise their clients to marshall the best evidence possible to advance their cases. In many cases, the parties will be unable to afford the necessary experts' fees so that actuarial evidence, however desirable it might be, will not be available.

Professor Carol Rogerson, a proponent of the compensatory model of spousal support, found the basis of the model in the provisions of the *Divorce Act, 1985*. In an extensive study of reported decisions, she found that judges were applying a diversity of approaches because the statutory objectives in the Act were vague. The problem, she concluded, was not in the principles, but in their application by judges. She argued that this problem reflected a more "fundamental problem - the absence of a strong social consensus on the

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appropriate principles of support after marriage breakdown."[3] She criticized time-limited orders, based on unrealistic expectations that wives who had spent significant periods of time out of paid labour would be able to become self-sufficient. Rogerson found levels of spousal support for women to be too low, especially for "younger women ... who had reduced or ceased their participation in the labour force during the marriage, and who are often left with the post-divorce responsibility for the care of the children."[4]

The *Moge* decision addresses many of the deficiencies of spousal support law that had been identified by Professor Rogerson and others. Ontario family lawyer Philip Epstein has commented that

> [w]omen will take great satisfaction from this judgement. It arms them with real weapons in the battle for support. For a very long time obtaining adequate support has indeed been a battle for women, and *Moge* goes a long way to redress some of the injustices that have occurred.[5]

Professor Winifred Holland has argued that the *Moge* decision represents a desirable recognition that there can be no simple solution for spousal support; the diversity of marriage relationships today make it impossible for a single rule to determine the level of support that will properly compensate and provide for the dependent spouse's future needs.[6]

The *Moge* case, in direct contrast to the 1987 trilogy, is generally recognized to advocate larger awards of spousal support for wives. It has been criticized primarily as being too vague -- too many "political statements" are made without clear accompanying rules for

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(3) Carol J. Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act, 1985* (Part I)," (1990-91) 7 C.F.L.Q. 155, p. 161.

(4) *Ibid.*, p. 163.

(5) Philip M. Epstein, "Practice Pointers from *Moge*," Paper delivered at "Family Law à la *Moge*," Law Society of Upper Canada program held 30 March 1993, p. C-17.

(6) Winifred H. Holland, "The Rise and Demise of 'Causal Connection' - *Moge* v. *Moge*," Paper presented at "Family Law à la *Moge*," Law Society of Upper Canada program held 30 March 1993, p. B-36.

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applying them, particularly in the area of "quantum," or level of support.(7) Professor James McLeod, fearing that this decision is too generous to wives, has complained that if Madam Justice L'Heureux-Dubé's reasons are given full effect, "the courts may be close to equalizing incomes as well as family property."(8) Even Professor Holland, while generally supportive of the decision, observed the gap between principle and practice that *Moge* seems to represent. She ended her comment on the case by noting with concern that the quantum awarded to Mrs. Moge was very small - "Mrs. Moge got a Cadillac policy judgement from the Supreme Court of Canada but ended up with a bottom of the line award of $150.00 per month."(9)

The *Moge* decision will have a major impact on the practice of family law across Canada, and lawyers are already reviewing their files to make sure that their positions and pleadings take full account of the newly enhanced environment for spousal support claims by wives who have suffered an economic disadvantage by being out of the paid labour force during marriage. It seems likely that the importance of the trilogy will in future be restricted to cases of variation of separation agreements; even those cases, however, will likely be treated differently as a result of the sweeping references in *Moge* to the feminization of poverty and the cost consequences of child care responsibilities.

Settlement negotiations and litigation alike will be affected, as lawyers and judges adopt this new thinking from the country's highest court. Whether the legislative objective of reducing the negative economic impacts that marriage and divorce have had on Canadian women can be met with the help of these judicial principles remains to be seen. Its possible shortcomings notwithstanding, the new guidance provided in this difficult area of law is a step in the right direction.

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(7) See, for example, James G. McLeod, "Case Comment: *Moge* v. *Moge*," (1993) 43 R.F.L. (3d) 455.

(8) *Ibid.*, p. 459.

(9) Holland (1993), p. B-67.

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